

## PROGRESSIVE ACCOMMODATION: MOVING TOWARDS LEGISLATIVELY APPROVED INTERMITTENT PARENTAL LEAVE

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### I. INTRODUCTION

Most Americans continue to struggle against the widely held belief that work and family responsibilities inherently conflict. This notion, that work and family demands are incompatible, stems from the traditional ideology that the family nucleus is comprised of two separate entities: the family caretaker and the income producer.<sup>1</sup> However, changes in the composition of the workforce, primarily the rise of dual-earner families and single-parent households, have increased the need for flexible work policies that enable workers to effectively parent without sacrificing their careers.<sup>2</sup> Without such policies, both workers and children suffer.<sup>3</sup>

Recently enacted legislative efforts and current employer benefits programs have fallen short of meeting the needs of this changing demographic and have failed to account for the types of “family risks” current workers must guard against.<sup>4</sup> Most successful legislative efforts have focused on providing employees with time off strictly for medical emergencies, without recognizing the need for diversified

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<sup>1</sup> Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 309–10 (2004) (“The majority of families today are no longer traditional patriarchal families with a full-time stay-at-home mother and a father who works out of the house.”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 312–23 (discussing the impact that the work-family conflict has on different members of society).

<sup>4</sup> Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 7–14 (2002) (introducing a “Family Risk Insurance Proposal” that recognizes the need to accommodate various current “family risks,” including short-term leave).

leave options.<sup>5</sup> The Family and Medical Leave Act<sup>6</sup> (FMLA), for example, specifically addresses the need to provide employees with the opportunity to take time off to address serious medical illnesses, family emergencies, and the birth or adoption of a child, but it does not require accommodation for routine childcare obligations.<sup>7</sup>

In response to the need for updated work-family legislation, Representative Carolyn Maloney of New York has proposed to amend the FMLA “to allow employees to take . . . parental involvement leave to participate in or attend their children’s and grandchildren’s educational and extracurricular activities . . . .”<sup>8</sup> The amendment, entitled the Family and Medical Leave Enhancement Act of 2005<sup>9</sup> (the “Enhancement Act”), provides that all employees covered by the FMLA be permitted to take “a total of four hours of leave during any 30-day period, and a total of 24 hours of leave during any 12-month period” to attend school events and extracurricular activities or accompany their children on routine medical visits.<sup>10</sup>

This Comment argues that Congress should enact a law that provides for parental involvement leave like that proposed in the Enhancement Act; however, it argues that Congress should enact the law under the Commerce Clause,<sup>11</sup> rather than as an amendment to the FMLA, which has been framed as anti-discrimination legislation under Section 5 of the Fourteenth Amendment.<sup>12</sup> The progressive work-family legislation should be framed as a substantive entitlement program that fosters an easier transition between family and work responsibilities for all employees of covered entities.

This Comment is organized in three parts. Part II argues that parental involvement leave is necessary to ease work related stress on parents and remove the harm to children from the absence of meaningful parental participation in their lives. Part III outlines the Family and Medical Leave Enhancement Act<sup>13</sup> and argues that although it could be passed as an amendment to the FMLA under Section 5 of the Fourteenth Amendment, it would be better passed independently under the Commerce Clause. It reviews research suggesting that clas-

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<sup>5</sup> *Id.*

<sup>6</sup> 29 U.S.C. §§ 2601–2654 (2000).

<sup>7</sup> *Id.*

<sup>8</sup> H.R. 476, 109th Cong. (2005).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>12</sup> 29 U.S.C. § 2601(b) (2000); U.S. CONST. amend. XIV.

<sup>13</sup> H.R. 476, 109th Cong. (2005).

sification of the FMLA as anti-discrimination legislation may have hampered its impact and argues that a more effective means of addressing parental concerns is to shed the anti-discrimination classification that addresses gender roles and instead pass a gender-neutral family initiative aimed at worker and family health. Part III also responds to potential critics by pointing to evidence that the cost to employers of this legislation is likely to be minimal.

## II. THE WORK-FAMILY CONFLICT AND EXISTING LAW

In order to evaluate the current state of the work-family conflict, this section examines the historical role that gender has played in the workplace. It then details the impact that the work-family conflict has had on parents and their children. It concludes with an evaluation of the current FMLA and how it fails to address parental concerns for short-term intermittent leave.

### A. *The Conflict and its Animus*

Traditional ideology concerning labor and family roles suggests that most Americans view these responsibilities as diametrically opposed.<sup>14</sup> Historically, this idea manifested itself through the widely held belief that males and females occupy different roles in society.<sup>15</sup> Specifically, men were deemed to provide economic stability to the family unit while women served as the nurturers of the children.<sup>16</sup> These stereotypes about male and female contributions, or lack thereof, in both domains have remained consistent, even in the face of changes in the workforce demographic.<sup>17</sup> Today, despite dramatic increases in the number of women that actively participate in the workforce and the number of men that participate in caretaking, employers have failed to formulate any workplace response.<sup>18</sup>

Specifically, employers have failed to account for the unique challenges that parent-workers face when balancing their roles as

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<sup>14</sup> Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1118 (1986) ("The male role is that of worker and breadwinner, the female role is that of childbearer and rearer.").

<sup>15</sup> *Id.*

<sup>16</sup> See Ulrich, *supra* note 4, at 5.

<sup>17</sup> Kaminer, *supra* note 1, at 309–10. "Between 1969 and 1998, participation in the labor force by married women nearly doubled, and participation by married women with children under the age of three increased nearly threefold. By 2000, sixty-four percent of married couples with children under the age of eighteen had both parents working outside the home, and in 2002, seventy-two percent of mothers with children age one and older were in the labor force." *Id.* at 310.

<sup>18</sup> *Id.* at 310.

both a parent and an employee.<sup>19</sup> Employer perceptions continue to center around the “ideal worker,” based on the traditional life patterns of men who are presumed to be free from the restraints inherent in having childcare obligations.<sup>20</sup> In addition, employers still convey the idea that productivity and performance are achieved by the exclusion of family concerns.<sup>21</sup> This “ideal worker” is someone who comes in early and works late and is not distracted by outside commitments, including the need to participate in familial obligations such as childrearing.<sup>22</sup> In recent years, in fact, many employers have increased the number of required work hours and decreased the availability of time off from work.<sup>23</sup> The result has been an overall failure on the part of businesses to incorporate family values and the needs of others into a workable and productive business model.<sup>24</sup>

Quality-of-life concerns have stimulated a persistent problem, frequently characterized as the work-family conflict. Work-family conflict occurs when participation in the workforce restricts an employee’s ability to effectively meet family demands.<sup>25</sup> There are many factors that contribute to this conflict, including time constraints, work overload, and unsupportive work environments.<sup>26</sup> The pressures associated with these factors can result in dissatisfaction and distress, which increase the likelihood of psychological spillover between work and family tasks.<sup>27</sup>

Although parents desire increased time with their families and seek to nurture their children, most parents also desire career advancement and the opportunity for upward mobility in the workplace.<sup>28</sup> But the ability to advance professionally is limited by the lack

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<sup>19</sup> *Id.* at 310–12.

<sup>20</sup> *Id.*

<sup>21</sup> Finley, *supra* note 14, at 1119–20.

<sup>22</sup> Joan C. Williams & Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES 849, 849 (2004) (discussing inflexible work schedules that create an environment that leads to the economic marginalization for parents with children).

<sup>23</sup> See Kaminer, *supra* note 1, at 310–11.

<sup>24</sup> *Id.* at 311.

<sup>25</sup> Patricia Voydanoff, *Work Demands and Work-to-Family and Family-to-Work Conflict: Direct and Indirect Relationships*, 26 J. FAM. ISSUES 707, 707 (2005) (“The study of work-family conflict is an important component . . . because it reflects a direct appraisal of the extent to which demands in one domain limit participation in the other domain.”).

<sup>26</sup> Finley, *supra* note 14, at 1126–27.

<sup>27</sup> Voydanoff, *supra* note 25, at 707–09.

<sup>28</sup> See Williams & Cooper, *supra* note 22, at 850 (“[A]lthough women definitely choose to spend time with family, they do not choose the depressed wages, or the lack of benefits and advancement, that now accompany that choice. The linkage of devotion to family with economic marginalization is socially constructed . . .”).

of institutional support from the government and the failure of private employers to accommodate family responsibilities.<sup>29</sup> As a result, the “ideal worker” needs to be redefined to reflect a more realistic and typical picture of the life of an adult, which balances work and family responsibilities, as opposed to its current definition, which ostracizes parents because of their dual obligations.<sup>30</sup>

Children are also harmed by their parents’ inability to balance work and familial responsibilities. Recent child development studies have shown that a child’s subjective well-being is positively correlated with overall life satisfaction and mental health.<sup>31</sup> In order to achieve subjective well-being, a child must exhibit “relatively high levels of positive affect, relatively low levels of negative affect, and the overall judgment that one’s life is a good one[,] . . . identified as life satisfaction.”<sup>32</sup> Given the importance of developing life satisfaction in children early on, researchers have developed and tested hypotheses about how this can be achieved.<sup>33</sup> Although there are many variables that can contribute to increasing life satisfaction,<sup>34</sup> the overlapping of two categories are particularly relevant here—satisfaction with family and participation in extracurricular activities.<sup>35</sup> Overall family satisfaction exists when parents effectively provide social support for their children.<sup>36</sup> Studies suggest that fostering positive familial relationships and providing emotional support and encouragement early in life are ways to promote subjective well-being.<sup>37</sup>

An example of this support is a parent’s involvement in a child’s primary educational experience.<sup>38</sup> As the most influential source in

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<sup>29</sup> Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 97–99 (2000) (discussing the “ideal worker” norm and how it impacts women’s ability to advance professionally, since the American workplace is framed around the male worker).

<sup>30</sup> See Williams & Cooper, *supra* note 22, at 850.

<sup>31</sup> Nansook Park, *Positive Development: Realizing the Potential of Youth: The Role of Subjective Well-Being in Positive Youth Development*, 591 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 27 (2004).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 31–33.

<sup>34</sup> *Id.* (categorizing the most relevant factors that help to contribute to subjective well-being, including: biological temperament, family satisfaction, parenting style, discrepancies on views of parents and their children, participation in activities, and major and minor daily life events).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Park, *supra* note 31, at 27.

<sup>38</sup> See generally CAREY OLMSCHIED, PARENTAL INVOLVEMENT: AN ESSENTIAL INGREDIENT (1994).

children's development, active parental involvement in a child's education is one of the most important factors in determining the degree of success that a child will have in school.<sup>39</sup> This is because motivation and encouragement, not cognitive and intellectual capabilities, are at the root of a child's educational accomplishments.<sup>40</sup>

Research also shows that a child's active participation in structured extracurricular activities correlates to higher overall life satisfaction.<sup>41</sup> Extracurricular activities are defined as "discretionary activities that are physically or mentally stimulating to the individual and contain some structural parameters."<sup>42</sup> The habitual involvement in these group activities, including sports and participation in organizations and clubs, has dramatic effects on a child's happiness.<sup>43</sup> Research shows that the participation in these activities can enhance individual feelings of self-confidence and worth, as well as stimulate positive feelings that carry over to increased academic performance.<sup>44</sup> Additionally, increases in the number of quality social interactions can have a positive impact on the overall life satisfaction and positive contribution to society that a child will make in the future.<sup>45</sup>

However, parental support is critical to the positive affect that children get from extracurricular activities.<sup>46</sup> Because most working parents feel time-constrained from having to work so many hours, parental involvement in support of extracurricular activities is hampered.<sup>47</sup> Many working parents are forced to abstain from active participation in their child's extracurricular activities, as well as their children's education.<sup>48</sup>

#### B. *The FMLA's Limited Reach*

With few employers actively volunteering to address work-family concerns, Congress responded with the enactment of the Family and

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<sup>39</sup> *Id.* at 1.

<sup>40</sup> Maria Mei-ha Wong & Mihaly Csikszentmihalyi, *Motivation and Academic Achievement: The Effects of Personality Traits And the Quality of Experience*, 59 J. PERSONALITY 539, 539-40 (1991) (evaluating the effect that an adolescent's motivation and personality has on academic success).

<sup>41</sup> See Park, *supra* note 31, at 32; see also Rich Gilman, *The Relationship Between Life Satisfaction, Social Interest, and Frequency of Extracurricular Activities Among Adolescent Students*, 30 J. YOUTH & ADOLESCENCE 749, 749-52 (2001).

<sup>42</sup> Gilman, *supra* note 41, at 752.

<sup>43</sup> Park, *supra* note 31, at 32.

<sup>44</sup> Gilman, *supra* note 41, at 752-53.

<sup>45</sup> Park, *supra* note 31, at 32.

<sup>46</sup> *Id.* at 34.

<sup>47</sup> See Finley, *supra* note 14, at 1126.

<sup>48</sup> See OLMSCHIED, *supra* note 38, at 1.

Medical Leave Act,<sup>49</sup> the first bill signed into law under President Clinton's administration.<sup>50</sup> The goal of the FMLA was to provide a mandatory federal labor leave standard that would help accommodate employees who needed to take time off to address pressing family concerns.<sup>51</sup>

The core provisions of the FMLA provide that eligible employees may take up to twelve weeks of unpaid leave annually to care for a spouse, child, or parent suffering from a "serious health condition."<sup>52</sup> Employees are also allowed to take FMLA leave for their own "serious health condition[s]."<sup>53</sup> Although no precise definition of the term "serious health condition" has been established in the statute, the term has been interpreted as a medical condition or illness that persists for a period of more than three days.<sup>54</sup> The FMLA also entitles employees to limited family leave benefits, including time off following the birth or adoption of a child.<sup>55</sup>

The FMLA places certain affirmative duties on employers whose employees are covered under the act. Employers must provide employees with information regarding FMLA coverage and its potential availability to them.<sup>56</sup> Employers must also guarantee that employees who request to take FMLA leave when available will not be detrimentally affected in terms of their status, tenure, or pay grade when they return to work.<sup>57</sup>

An employee is eligible under the FMLA if he or she has "worked for at least twelve months, for at least 1250 hours during the year preceding the start of the leave, and at a work site where the employer employs at least fifty workers within a seventy-five mile radius."<sup>58</sup> As a result of these requirements, new hires and employees of small businesses are not covered by the act.<sup>59</sup> In addition, at the

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<sup>49</sup> 29 U.S.C. §§ 2601–2654 (2000).

<sup>50</sup> Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER SOC. POL'Y & L. 39, 40 (1994).

<sup>51</sup> Robin R. Cockey, *The Family and Medical Leave Act: What You See and What You Get*, 12 AM. U. J. GENDER SOC. POL'Y & L. 1, 1–2 (2004) (discussing the provisions of the Family and Medical Leave Act).

<sup>52</sup> 29 U.S.C. § 2612(a)(1)(D) (2000).

<sup>53</sup> *Id.*

<sup>54</sup> See 29 C.F.R. § 825.114(a)(2) (2004) (establishing the guidelines for interpretation of the term "serious health condition" as stated in the FMLA).

<sup>55</sup> *Id.*

<sup>56</sup> 29 U.S.C. § 2619(a).

<sup>57</sup> *Id.* § 2614(a).

<sup>58</sup> *Id.* § 2611(2)(A)(i), (2)(A)(ii), (2)(B)(ii); see also Cockey, *supra* note 51, at 2.

<sup>59</sup> Cockey, *supra* note 51, at 2.

request of an employer, an employee might also be asked to provide certification from the appropriate health care provider, verifying that the purpose of the leave is for eligible care.<sup>60</sup>

The enactment of the FMLA reflects Congress's findings that the American workplace had not responded to pressing economic instability and familial insecurities arising from increased levels of stress associated with balancing work and family obligations.<sup>61</sup> In addition, Congress found that the job security of women is often compromised by the increased level of childcare responsibilities that are inherent in their roles as the primary childcare providers.<sup>62</sup> Furthermore, Congress realized that current employment policies had fallen short of providing the necessary time off for adequate balancing of work and family demands.<sup>63</sup>

The FMLA also purported to recognize the occurrence of major family life events and mandate that appropriate accommodations be instituted to provide leave on these occasions.<sup>64</sup> Specifically, the purpose of the law was to ensure that working parents could put their families ahead of job responsibilities, during extenuating circumstances, without risking the loss of their employment.<sup>65</sup> Additionally, "Congress sought to adjust family leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace."<sup>66</sup> Framed as anti-discrimination legislation, the FMLA suggested that across-the-board leave for all employees would eliminate any incentives to hire men over women, since both would be entitled to the leave.<sup>67</sup>

Through the FMLA, Congress also sought to help change the perception that the burden of family demands is purely a woman's responsibility.<sup>68</sup> Family leave to care for ill parents, for example, is only permitted for the person whose parent is sick, which could shift the burden to men under certain circumstances.<sup>69</sup>

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<sup>60</sup> 29 U.S.C. § 2613(a).

<sup>61</sup> *Id.* § 2601.

<sup>62</sup> *Id.* § 2601(a)(5)–(6).

<sup>63</sup> *Id.* § 2601(a).

<sup>64</sup> Lenhoff & Withers, *supra* note 50, at 39–40 (analyzing the enactment of the FMLA and its legislative purpose).

<sup>65</sup> *Id.* at 48–49.

<sup>66</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 734 n.10 (2003).

<sup>67</sup> *Id.* at 737.

<sup>68</sup> See Lenhoff & Withers, *supra* note 50, at 49.

<sup>69</sup> 29 U.S.C. § 2612(a)(1)(C) (2000).



Despite its proposed benefits, the FMLA has been a disappointment in accomplishing its legislative objective to alleviate the pressures between work and family.<sup>70</sup> In 2000, a study conducted by the FMLA commission revealed that the FMLA has been largely ineffective in encouraging men to take family leave, and that women still make up the largest percentage of employees who take family leave.<sup>71</sup> Statistically, men have received the largest increase in the availability to take family leave under the FMLA, but have shown only marginal increases in their usage of the leave to date.<sup>72</sup>

A second problem with the FMLA has been the failure to increase the availability of family leave to employees, male or female.<sup>73</sup> Before the enactment of the FMLA, approximately forty percent of the labor force had access to family leave, as mandated through legislation or because of individual company policies.<sup>74</sup> Today, this percentage has largely remained stagnant due to the fifty-employee minimum that is required before the FMLA coverage applies.<sup>75</sup> As a result, the leave policies already in the marketplace prior to the enactment of the FMLA are still the most representative of the leave policies currently available to workers.<sup>76</sup> This result is logical because most covered establishments that currently provide leave are the same employers that provided family leave before the FMLA.<sup>77</sup> Therefore, it is ironic that the FMLA is classified as a comprehensive family leave mandate by the federal government since it has failed to produce a tangible increase in family leave availability across the board.<sup>78</sup>

A third problem with the FMLA, which this Comment specifically addresses, is the failure to provide parents with the opportunity

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<sup>70</sup> Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 85–91 (2004) (discussing the flaws of the current FMLA legislation).

<sup>71</sup> Michael Selmi, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 74–77 (2004) (explaining the statistics revealed in the 2000 study by the FMLA commission regarding the frequency and type of usage of FMLA leave).

<sup>72</sup> Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LAB. REV. 17, 18 (2001).

<sup>73</sup> *Id.* at 19–20.

<sup>74</sup> See Selmi, *supra* note 71, at 83.

<sup>75</sup> 29 U.S.C. § 2611 (2000).

<sup>76</sup> Selmi, *supra* note 71, at 83.

<sup>77</sup> *Id.*; see also Waldfogel, *supra* note 72, at 19 tbl.1. Establishment coverage data for the provision of leave benefits under the FMLA indicates that the percentage of employees that were covered by the law showed only marginal increases as compared to those that were previously covered. *Id.*

<sup>78</sup> Selmi, *supra* note 71, at 83.

to take short periods of time off to attend their children's extracurricular activities or participate meaningfully in school-sponsored educational programs.<sup>79</sup> Under the FMLA, parents may take family leave to attend to the "serious health conditions" of an eligible family member, to address their own "serious health conditions," or to take time off after the birth or adoption of a child.<sup>80</sup> Although the FMLA provides parents with the option to take extended time off from work, non-medical reasons that perpetuate the need for such leave are not covered. Thus, working parents must struggle to squeeze time into their work schedules to take part in their children's lives.<sup>81</sup> General family responsibilities such as errands and doctor appointments are regarded as the employees' responsibilities and are excluded from the list of acceptable reasons that parents can take family leave.<sup>82</sup> This inflexibility only helps to sustain the economic subordination of women in the workplace,<sup>83</sup> and it restricts the parental involvement that is crucial to each child's social betterment.<sup>84</sup>

The purpose of the Enhancement Act<sup>85</sup> is to provide a legislative response consistent with the original intent behind the FMLA: to alleviate gender inequities in the workplace, particularly those that have arisen due to the influx of more women into the workforce.<sup>86</sup> The enactment of this parental leave law would provide an institutional foundation that would encourage and support parents with concurrent daily responsibilities.<sup>87</sup> As such, parental involvement leave would allow parents to find the time to meaningfully participate in their children's lives and would help to cure a major stress associated with the work-family conflict.<sup>88</sup>

### III. INTERMITTENT PARENTAL LEAVE: EMBRACING AN ENTITLEMENT

Recognizing the failure of current legislative mandates to alleviate the time famine associated with work-family conflict, Representa-

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<sup>79</sup> Thompson, *supra* note 70, at 90.

<sup>80</sup> 29 U.S.C. § 2612(a)(1) (2000).

<sup>81</sup> Thompson, *supra* note 70, at 90.

<sup>82</sup> Finley, *supra* note 14, at 1127.

<sup>83</sup> *Id.* at 1127-28.

<sup>84</sup> Kaminer, *supra* note 1, at 316-17.

<sup>85</sup> See *supra* notes 8-10 and accompanying text.

<sup>86</sup> Kathryn Branch, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119, 151 (1994) (discussing the need for a comprehensive policy to address parental concerns when trying to balance career and family commitments).

<sup>87</sup> *Id.*

<sup>88</sup> See Thompson, *supra* note 70, at 90.

tive Carolyn Maloney (D-NY) has proposed an expansion of the family leave coverage under the FMLA.<sup>89</sup> The proposal, the Family and Medical Leave Enhancement Act of 2005,<sup>90</sup> seeks to amend the FMLA to allow employees to take additional intermittent parental involvement leave to participate in their children's or grandchildren's extracurricular and educational activities.<sup>91</sup> The Enhancement Act would also clarify the FMLA by stating that employees may use leave to attend to routine family medical needs and assist with the care of elderly relatives.<sup>92</sup> Furthermore, the Enhancement Act proposes to broaden the availability of family leave by changing the minimum number of employees, from fifty to twenty-five, which an employer must have for the law to apply.<sup>93</sup>

Under the Enhancement Act, eligible employees are allowed to take up to four hours of parental involvement leave per month, and up to a maximum of twenty-four hours of parental involvement leave during any twelve month period.<sup>94</sup> To use the parental involvement leave, an employee's child must be enrolled in a qualifying elementary or secondary school or community organization and be an active participant in the sponsored youth programs that the school or organization offers.<sup>95</sup>

When employees choose to take parental involvement leave they must provide notice to their employer no later than seven days before the leave is set to begin.<sup>96</sup> In addition, upon the request of the employer, an employee is required to provide sufficient certification to verify the eligibility of the leave being requested.<sup>97</sup>

The Enhancement Act is a necessary step towards alleviating work-family conflict. The FMLA, as it currently stands, does not provide the necessary short-term intermittent leave required to adequately accommodate parents and their daily childcare obligations.<sup>98</sup> The FMLA also fails to provide employees with the opportunity to

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<sup>89</sup> H.R. 476, 109th Cong. (2005).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* § 5.

<sup>93</sup> *Id.* § 2.

<sup>94</sup> *Id.* § 3(A). This parental involvement leave would provide eligible employees with the option to take time off intermittently or as a supplement for a reduced work schedule. H.R. 476, 109th Cong. (2005).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 3(d).

<sup>97</sup> *Id.* § 3(f).

<sup>98</sup> *See supra* Part II.B.

take parental leave for any non-medical reason.<sup>99</sup> The reality is that the demands of the current American workforce conflict with the responsibilities and needs of parents. The “school day and school year conflict with the work day and work year, and the ‘occupational cycle of the workplace and the life cycle of the family and individual family members’ clash.”<sup>100</sup> The Enhancement Act thus provides a way to enact federal policy that responds to the foreseeable daily problems encountered by parents, as opposed to only unforeseeable and extraordinary circumstances that the current FMLA addresses.<sup>101</sup>

The next subpart of this Comment begins with a brief review of *Nevada Department of Human Resources v. Hibbs*,<sup>102</sup> in which the Court characterized the FMLA as anti-discrimination legislation, aimed at addressing gender discrimination against women in the workplace. The section draws on research recognizing men’s reluctance to take parental leave under the FMLA to argue that to increase the use of parental leave it must be framed as a family entitlement program under the Commerce Clause. The last section responds to potential criticism of an entitlement program by arguing that the cost to employers in effectuating this program is likely to be minimal.

A. *The FMLA (and Enhancement Act) as Anti-Discrimination Legislation According to Hibbs*

The Eleventh Amendment of the U.S. Constitution states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>103</sup> Although not specifically enumerated, judicial interpretation has provided that the Eleventh Amendment also applies to states in suits brought by their own citizens.<sup>104</sup> Accordingly, the Constitution upholds the right of state sovereignty to prohibit federal jurisdiction over suits directed at non-

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<sup>99</sup> See 29 U.S.C. § 2612 (2000) (outlining the statutory leave requirements to take FMLA leave, including the birth or adoption of a child, and serious health conditions). The need for parental leave to cover non-medical reasons is proposed in the Enhancement Act. H.R. 476 109th Cong. (2005).

<sup>100</sup> Bornstein, *supra* note 29, at 97.

<sup>101</sup> *Id.* at 108.

<sup>102</sup> 538 U.S. 721, 726 (2003).

<sup>103</sup> U.S. CONST. amend. XI.

<sup>104</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72–73 (2002).

consenting states.<sup>105</sup> However, Congress can abrogate this immunity from federal jurisdiction, if certain requirements are met.<sup>106</sup>

More specifically, Congress must unequivocally state its intent to abrogate the states' immunity and must do so under a legally permissible grant of power, set forth in the Constitution.<sup>107</sup> Determination of whether Congress has sufficiently expressed its intent is carefully scrutinized pursuant to the "clear statement rule."<sup>108</sup> This test requires that Congress specifically set forth within the legislation its unmistakable intent to abrogate the states' immunity.<sup>109</sup> In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court stated that Congress's intent was unmistakable because the FMLA provisions allowed employees to seek remedial action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction,"<sup>110</sup> and Congress has defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State."<sup>111</sup>

In addition to determining the existence of clear congressional intent, the Court in *Hibbs* also analyzed whether Congress acted within its constitutional authority when it enacted the FMLA as a family leave measure applicable to abrogating states' sovereignty.<sup>112</sup> Authority to abrogate the states' immunity stems from the constitutional grant of authority to Congress to protect the rights of all citizens, under the Due Process Clause of the Fourteenth Amendment.<sup>113</sup> Section 1 of the Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>114</sup>

In order to implement the due process mandate in the Constitution, Congress has been granted power in Section 5 of the Fourteenth Amendment to "enforce the substantive guarantees in § 1 . . .

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

<sup>109</sup> *Kimel*, 528 U.S. at 73.

<sup>110</sup> *Hibbs*, 538 U.S. at 721, 724.

<sup>111</sup> *Id.* at 726.

<sup>112</sup> *Id.*

<sup>113</sup> U.S. CONST. amend. XIV, § 1.

<sup>114</sup> *Id.*

by enacting ‘appropriate legislation.’”<sup>115</sup> Specifically, Congress has the power under Section 5 to “remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which itself is not itself forbidden by the Amendment’s text.”<sup>116</sup> This enforcement authorization gave the Fourteenth Amendment much of its force, because it enlarged Congress’s power to enact appropriate legislation that made the Amendment fully effective.<sup>117</sup>

Furthermore, “such enforcement is no invasion of State sovereignty,” since Congress is acting within its delegated authority under the Constitution.<sup>118</sup> The Court, however, must “limit the enforcement power by stringently reviewing whether Congress compiled an extensive legislative record to document the pervasive nature of the constitutional problem that the legislation is supposed to correct.”<sup>119</sup> In practice, Section 5 legislation undergoes judicial scrutiny to assure that its enactment is a reaction to specific constitutional violations by the state rather than a congressional attempt to “redefine the States’ legal obligations.”<sup>120</sup>

In *City of Boerne v. Flores*,<sup>121</sup> the Court noted that a determination of whether Congress’s prophylactic legislation under Section 5 is constitutional is not only based upon showing a pattern of discrimination, as evidenced through legislative history, but further analysis must indicate “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>122</sup> The Court stated that this determination is made after careful consideration of the motivating factors behind Congress’s enactment of the legislation.<sup>123</sup> In addition, the Court noted that “the appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”<sup>124</sup>

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<sup>115</sup> *Hibbs*, 538 U.S. at 727.

<sup>116</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2002).

<sup>117</sup> *See id.*

<sup>118</sup> Christopher Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 433 (2003) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

<sup>119</sup> *Id.* at 458.

<sup>120</sup> *Hibbs*, 538 U.S. at 728.

<sup>121</sup> 521 U.S. 507 (1997).

<sup>122</sup> *Id.* at 520.

<sup>123</sup> *Id.* at 530.

<sup>124</sup> *Id.* (citation omitted).

In *Nevada Department of Human Resources v. Hibbs*,<sup>125</sup> an employee from the Nevada Department of Human Resources sought leave under the FMLA to care for his ailing wife.<sup>126</sup> After granting him leave, his employer subsequently terminated his employment when he failed to return promptly to work.<sup>127</sup> The employee sued the state of Nevada for wrongful discharge, and the Supreme Court analyzed whether an individual can sue a non-consenting state for damages under the FMLA in federal court.<sup>128</sup>

The Supreme Court started its analysis by confirming that the Constitution does not specifically authorize federal jurisdiction over suits against non-consenting states.<sup>129</sup> The Court stated that “Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment.”<sup>130</sup>

The Court stated that Congress had sufficiently articulated its intent to abrogate the states’ immunity in the FMLA statute, but needed to test the constitutionality of this exercise.<sup>131</sup> The Court established that in applying the test set forth in *Boerne*, valid Section 5 legislation must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>132</sup> The Court subsequently looked to the evidence put forth in the congressional hearings, prior to the FMLA’s enactment, to make this determination.<sup>133</sup>

Examination of the legislative record by the Court revealed that, historically, state laws discriminated against women when it came to employment opportunities.<sup>134</sup> In enacting the FMLA, Congress sought to remedy the unequal treatment of men and women in the workplace through the implementation of gender-neutral family leave to all eligible employees.<sup>135</sup> The text of the Act states that inequitable employment practices relating to persistent stereotyping regarding women’s caretaking roles were a perpetual hindrance on

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<sup>125</sup> 538 U.S. 721 (2003).

<sup>126</sup> *Id.* at 725.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 726.

<sup>130</sup> *Id.*

<sup>131</sup> *Hibbs*, 538 U.S. at 726.

<sup>132</sup> *Id.* at 728 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

<sup>133</sup> *Id.* at 730–32.

<sup>134</sup> *Id.* at 729.

<sup>135</sup> *Id.* at 728–29.

their career opportunities and advancement in the workplace.<sup>136</sup> Despite minimal advancement, the Court found that women still faced pervasive discrimination in the workplace, especially with the distribution of leave benefits.<sup>137</sup>

In light of the evidence presented, the Court stated:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.<sup>138</sup>

Furthermore, the Court declared that the FMLA satisfied the *Boerne* test, since it was a narrow constraint on employer activities and did not impair the decision-making abilities in other areas of employment.<sup>139</sup> Thus, employers would still have autonomy in making routine business decisions and setting the guidelines for terms and conditions of employment.<sup>140</sup>

In *Hibbs*, the Court recognized that “[s]tates continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.”<sup>141</sup> Careful analysis revealed that these differences had no correlation to any tangible differences in the capabilities between men and women.<sup>142</sup> Instead, employers continued to rely on pervasive sex-stereotyping about women’s inability to balance work and family responsibilities.<sup>143</sup>

A closer look revealed that even where states’ employment policies were not facially discriminatory, they had a disparate impact on working parents, particularly women employees.<sup>144</sup> In enacting the FMLA, Congress had hoped that a federal mandate would help to re-

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<sup>136</sup> *Id.* at 729 n.2.

<sup>137</sup> *Hibbs*, 538 U.S. at 730.

<sup>138</sup> *Id.* at 737.

<sup>139</sup> *Id.* at 738–39.

<sup>140</sup> *See id.*

<sup>141</sup> *Id.* at 730.

<sup>142</sup> *Id.* at 731.

<sup>143</sup> *Hibbs*, 538 U.S. at 731.

<sup>144</sup> *Id.* at 732.



strict reliance on stereotypes.<sup>145</sup> Congress also envisioned that more progressive accommodations would be adopted in the future to expand family leave coverage and mitigate this discrimination.<sup>146</sup> However, such an expansion has failed to materialize.<sup>147</sup>

As a result of this failure, an FMLA amendment that covers short-term parental involvement leave is necessary to implement the Act's original goals.<sup>148</sup> Since "women continue to take primary responsibility for family and home without cultural and institutional support, gender equity in employment cannot be achieved."<sup>149</sup> Accordingly, federally approved parental leave is a necessity if working parents, and more specifically mothers, can balance daily family responsibilities and compete in an increasingly competitive marketplace. Since the FMLA has only addressed work-family conflict with respect to family emergencies, the Enhancement Act's amendments to the FMLA will broaden the government's commitment to establishing a concurrent working relationship between permanent employment and family.

Although the Enhancement Act, framed as anti-discrimination legislation under the guise of the FMLA, would serve to alleviate some of the work-family conflict by allowing parents to take parental involvement leave on a gender-neutral basis, the classification as anti-discrimination legislation decreases the likelihood that the Enhancement Act will be effective. The FMLA, and by extension the Enhancement Act, would still be framed as a direct response to women's family and workplace accommodation issues.<sup>150</sup> Although the FMLA frames the work-family conflict in gender-neutral terms, the very substantive guarantees of the FMLA that are meant to fix the work-family conflict actually perpetuate women's primary role as caretakers and serve as an impediment to men who seek to participate more fully in family life.<sup>151</sup>

The next section evaluates research indicating that men's reluctance to take parental leave is based on the leave's classification as anti-discrimination legislation. Further, the section argues that to increase the likelihood that men will participate in parental leave pro-

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<sup>145</sup> See 29 U.S.C. § 2601(b)(3)–(5) (2000).

<sup>146</sup> H.R. REP. NO. 103-8, pt.1, at 49 (1993).

<sup>147</sup> Thompson, *supra* note 70, at 90–91 (stating that several attempts have been made by members of Congress to expand the FMLA coverage to include, among other things, parental involvement leave).

<sup>148</sup> See *supra* notes 1–10 and accompanying text.

<sup>149</sup> See Branch, *supra* note 86, at 120.

<sup>150</sup> 29 U.S.C. § 2601(a)(5)–(6) (2000).

<sup>151</sup> Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1061 (1994).

grams, the leave needs to be enacted as a gender-neutral substantive entitlement program under the Commerce Clause.

*B. Parental Leave as a Substantive Entitlement Program*

With social science evidence suggesting that parental involvement in children's educational and extracurricular activities is important for their social development, the government must continue to take steps to foster and strengthen those relationships. In order to make more time for parent-child relationships and alleviate concerns over work-family conflict, the government should enact federal legislation to secure intermittent parental involvement leave to parents on a gender-neutral basis. Since men have been reluctant to take FMLA leave in the past, a substantive entitlement program aimed at the social betterment of the family might encourage men to participate more actively in caretaking.

Congress has power to enact a substantive entitlement program for parental involvement leave, pursuant to the Commerce Clause of the U.S. Constitution. This clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its authority to] regulate Commerce with foreign Nations, and among the several States . . . ."<sup>152</sup> In *United States v. Lopez*,<sup>153</sup> the Court held:

[There are] three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.<sup>154</sup>

Congress's enactment of a substantive entitlement program would thus be proper as it substantially affects interstate commerce.<sup>155</sup>

By enacting parental leave pursuant to the Commerce Clause, the problems of underutilization of FMLA leave would be substantially diminished because it is more likely that both women and men would take advantage of the leave opportunities offered. This is be-

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<sup>152</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>153</sup> 514 U.S. 549 (1995).

<sup>154</sup> *Id.* at 558–59 (citations omitted).

<sup>155</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–27 (2003).

cause the nature of the FMLA, as anti-discrimination legislation, has proven to be a formidable barrier to the use of parental leave by fathers.<sup>156</sup> Under the current FMLA, men feel restrained from participating or taking on roles in the home, because the FMLA was enacted in response to women's issues.<sup>157</sup> Therefore, enacting parental involvement leave as an entitlement rather than as an anti-discrimination measure might serve to remove the inherent barriers that currently discourage *all* parents, but particularly men, from using parental leave.

Several reasons have been identified for men's reluctance to take FMLA leave. Granted, one of the most prevalent reasons is socially driven. Both men and women face workplace hostility when they attempt to focus their attention on family responsibilities, but men are predominantly faced with the "your wife should do it" syndrome.<sup>158</sup> Most employers, though not expressly, create work environments that suggest that men who take time off to care for their children or help around the house are in jeopardy of sacrificing their careers.<sup>159</sup> Surveys indicate that a majority of employers thought it was unreasonable for a man to take any parental leave.<sup>160</sup> Even more troubling, employers who provided parental leave as part of their compensation packages thought it was unreasonable for men to use the leave, even though companies made the leave available.<sup>161</sup> These employer expectations that fathers will refrain from taking parental leave also translate into increased peer pressures from bosses and co-workers to stay committed to the job.<sup>162</sup>

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<sup>156</sup> Chuck Halverson, *From Here To Paternity: Why Men are not Taking Paternity Leave Under The Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 261-63 (2003) (discussing the five major obstacles that account for low levels of male participation in the FMLA leave programs).

<sup>157</sup> 29 U.S.C. § 2601(a)(5) (2000) ("[T]he primary responsibility for family care-taking . . . affects the working lives of women more than it affects the working lives of men . . .").

<sup>158</sup> Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39 (1998).

<sup>159</sup> Malin, *supra* note 151, at 1089.

<sup>160</sup> Catalyst, Report on a National Study of Parental Leaves 65 (1986), reprinted in *Parental and Medical Leave Act of 1986: J. Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education & Labor*, 95th Cong. 210 (1986).

<sup>161</sup> *Id.*

<sup>162</sup> Erin Gielow, *Equality In The Workplace: Why Family Leave Does Not Work*, 75 S. CAL. L. REV. 1529, 1534 (2002) (discussing the presence of workplace hostility and intolerance towards men who expresses an interest in taking family leave); Melinda Ligos, *Fear Keeps Men From Parental Leave*, ORANGE COUNTY REG., June 12, 2000, at E01 ("[M]en are terrified to take parental leave . . . . While their organizations may pro-

Another reason why men do not take parental leave is the fear of social stigmatization. Gendered norms classify men as the breadwinner and women as the caretaker of the family.<sup>163</sup> Throughout history, women have been considered to be the more competent and knowledgeable parent to raise and nurture a couple's young child.<sup>164</sup> Because of this perception that women possess an increased level of competency for parental tasks, a mother's responsibility for her children became the traditional social norm, and the labor market followed these practices.<sup>165</sup> As such, the presumption in American society about caretaking responsibilities is that "[t]he father's primary role i[s] providing economic security [and] functions as a barrier to increased paternal involvement in the family."<sup>166</sup> Therefore, the "your wife should do it" stereotype embedded in the FMLA treats men harshly if they do not conform, and serves to deter fathers from taking leave, resulting in paternal marginalization.<sup>167</sup>

Because men have been reluctant to make use of FMLA leave, framing the Enhancement Act as anti-discrimination legislation puts the same constraints on the parental intermittent leave that currently exist with respect to paternity leave under the FMLA. As anti-discrimination legislation, men would need to paint themselves as victims in order to prove that they qualify for leave under the statute. According to Kristin Bumiller, when individuals are forced to assume the role of the victim, their self-autonomy and individual identity is questioned.<sup>168</sup> Further, those who have attempted to challenge their classification as a member of a stigmatized social class are often faced with intense animosity from their peers.<sup>169</sup> Since, historically, women have been the class faced with work-family problems, it is likely that men will be unwilling to voluntarily subject themselves to the realization that they, too, are a discriminated class. Thus, it is imperative

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fess to be family-friendly, their bosses are giving them the message that men who take leave are not very manly, or are somehow letting down the team.").

<sup>163</sup> See Gielow, *supra* note 162.

<sup>164</sup> See Malin, *supra* note 151, at 1055 (discussing the historical evolution of child-birth leave and its impact on the current labor division about men and women's roles as caretakers).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1066.

<sup>167</sup> *Id.* at 1089.

<sup>168</sup> KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 73 (1988).

<sup>169</sup> *Id.* at 52. For example, Bumiller conducts a snapshot of the inherent problems of accepting victimization through interviews with individuals who have encountered discriminatory behavior. *Id.* at 52-58. The resulting study revealed that individuals tend to accept their role as a victim for self-preservation and to avoid the stigmatization label. *Id.* at 53.

that parental involvement leave be enacted without the anti-discrimination classification that will inhibit the likelihood that men will use the leave.

Additionally, the inclusion of men in caretaking responsibilities is crucial to establishing a bond between a father and his child.<sup>170</sup> Studies have shown that paternal involvement benefits children in all aspects of their development and is strongly correlated to a child's strong academic performance.<sup>171</sup> Each parent's distinct contribution in raising his or her child influences directly the likelihood that a child will be well-behaved and will excel academically.<sup>172</sup> Therefore, a child's successful development hinges on the inclusion of both men and women in the nurturing process, as both serve as invaluable assets to the development of a well-rounded child.<sup>173</sup>

### C. *Responding to Critics*

In addition to the peace of mind employees gain from a more flexible work environment, a closer examination of the costs of implementing parental leave policies reveals increased benefits to employers. As stated above, despite the changed composition of the workforce, employers have been hesitant to make corresponding business changes because they continue to operate under the presumption that the typical worker is a man who does not bear the responsibility for childrearing.<sup>174</sup> The dedication to the idea of "face time" perpetuates this theory.<sup>175</sup> To exhibit an adequate amount of "face time," employers demand that their workers spend more hours at work to show commitment to the job, even though no statistical analysis exists to prove that these increased hours at work help to boost work productivity or performance.<sup>176</sup> In fact, employer reports suggest that providing family leave and its subsequent usage by em-

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<sup>170</sup> See Malin, *supra* note 158, at 27–30.

<sup>171</sup> See CHRISTINE WINQUIST NORD ET AL., FATHERS' INVOLVEMENT IN THEIR CHILDREN'S SCHOOLS 6–7 (1997), available at <http://www.dadsnow.org/studies/ncesdad1.pdf>.

<sup>172</sup> See Malin, *supra* note 158, at 27–30 (discussing how paternal relationships correlate to good grades and how maternal relationships contribute to good behavior).

<sup>173</sup> NORD ET AL., *supra* note 171.

<sup>174</sup> Finley, *supra* note 14, at 1126.

<sup>175</sup> JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT 164 (2000).

<sup>176</sup> *Id.*

ployees has no noticeable effect on the company's business performance.<sup>177</sup>

Similarly, providing employees with a more flexible schedule has been shown to have a positive effect on increasing overall productivity.<sup>178</sup> Employers who make parental accommodations for employees reap the benefits of increased morale, loyalty, and improved retention.<sup>179</sup> In addition, recognition of employees' external non-work concerns compels workers to exert more effort and show their appreciation through increased levels of performance.<sup>180</sup> Making parental leave available to employees also serves to alleviate some of the time crunch associated with balancing work and family demands, which in turn serves to bolster productivity, since workers can more easily concentrate on work.<sup>181</sup>

Furthermore, employers gain economic benefits by providing family leave.<sup>182</sup> Data suggests that providing family leave benefits is a favorable and cost-effective mechanism to control non-income producing expenditures.<sup>183</sup> The cost of hiring and retraining new employees outweighs the costs associated with granting leave to current employees.<sup>184</sup> To compensate for employee absences, employers have either reassigned work to other employees or hired temporary workers.<sup>185</sup> Both methods of covering work have proven effective and have not caused disruptions to the work environment.<sup>186</sup> Even intermittent leave, which is presumed to be particularly disruptive, has not had a noticeable effect on work quality, productivity, or business performance.<sup>187</sup>

Furthermore, employers' failure to implement family-friendly policies may also produce unintended consequences. The failure to provide parents with the time to balance both their family needs and job duties may lead to a reduction in the quality of the applicant

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<sup>177</sup> Waldfogel, *supra* note 72, at 19. The 2000 surveys indicated that "covered establishments generally reported that the FMLA had no noticeable effect on their business as regards productivity, profitability, and growth." *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> David Goll, *Work-life Programs Benefit Small Businesses, Too*, E. BAY BUS. TIMES, Jul. 21, 2000, available at <http://eastbay.bizjournals.com/eastbay/stories/2000/07/24/smallb3.html>.

<sup>180</sup> See Kaminer, *supra* note 1, at 322.

<sup>181</sup> See Lenhoff & Withers, *supra* note 50, at 55.

<sup>182</sup> *Id.* at 51-53.

<sup>183</sup> See *id.*

<sup>184</sup> *Id.*

<sup>185</sup> Waldfogel, *supra* note 72, at 19.

<sup>186</sup> *Id.* at 18.

<sup>187</sup> *Id.*

pool.<sup>188</sup> Some parents will be forced to sacrifice their careers for the well-being of their families.<sup>189</sup> Others will be foreclosed from the job market, despite having all the desired soft-skills that a prospective employer seeks when evaluating potential hires.<sup>190</sup>

Clearly, positive contributions to the labor force can be made by the alternative employment candidate who does not conform to the traditional employee model that most employers have become accustomed to. Although many circumstances require family needs to submit to more pressing business concerns, the overall benefit achieved from making the workplace more accommodating has produced positive results when applied.<sup>191</sup> For example, the Families and Work Institute's Business Work-Life Study, and the National Study of the Changing Workforce, examined employers' responsiveness to work-family conflicts.<sup>192</sup> The results of the research found that employers who provided supportive work environments reaped the benefits of more dedicated and satisfied employees.<sup>193</sup> On the other hand, those employers that maintained a less supportive work environment found that their employees reported increases in stress and anxiety.<sup>194</sup>

In addition to criticism by employers that intermittent parental leave might prove too costly, some critics of this proposal might point to its limited impact on state workers as another drawback. If a federal substantive entitlement program were adopted under the Commerce Clause,<sup>195</sup> there would be an impact on state workers' potential causes of action for violations of the law. Because states generally have immunity from suit under the Eleventh Amendment,<sup>196</sup> the *Hibbs*<sup>197</sup> decision was significant in that it allowed the abrogation of this immunity pursuant to Section 5 of the Fourteenth Amendment.<sup>198</sup> This decision centered on the pervasive role that sex-stereotyping has played in employment decisions, particularly by state

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<sup>188</sup> Kaminer, *supra* note 1, at 323.

<sup>189</sup> See Finley, *supra* note 14, at 1123–28.

<sup>190</sup> Kaminer, *supra* note 1, at 323. Soft-skills, which can be learned from being a parent, generally include a potential applicant's ability to effectively manage his or her time, work efficiently, and collaborate in a team environment. See *id.*

<sup>191</sup> Waldfogel, *supra* note 72, at 51–53.

<sup>192</sup> FAMILIES AND WORK INSTITUTE, 2005 NATIONAL STUDY OF EMPLOYERS 1–2 (2005), available at <http://familiesandwork.org/site/research/reports/2005nse.pdf>.

<sup>193</sup> *Id.* at 28.

<sup>194</sup> *Id.*

<sup>195</sup> U.S. CONST. art. I, § 8, cl. 3

<sup>196</sup> *Id.* U.S. CONST. amend. XI.

<sup>197</sup> Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

<sup>198</sup> *Id.* at 726.

employers.<sup>199</sup> An entitlement program enacted under the Commerce Clause would be based on Congress's power to regulate activity that "substantially affects interstate commerce."<sup>200</sup> As a result, state actors would not be subject to suits on any breach of the substantive entitlement program, because legislation enacted under the Commerce Clause can never abrogate state sovereign immunity.<sup>201</sup>

Despite the fact that enactment under the Commerce Clause would foreclose the ability of a plaintiff to seek monetary damages for state violations of the Act, state employees would still be empowered to bring actions for injunctive relief for the state's failure to comply with a congressionally guaranteed federal right to intermittent parental involvement leave.<sup>202</sup> Moreover, it is possible that as the implementation of intermittent parental leave programs becomes widespread in the private sector, and social norms begin to change, states will consent to suits for damages.<sup>203</sup>

#### IV. CONCLUSION

Traditionally, men and women were deemed to occupy different roles in society.<sup>204</sup> Today, however, most American families do not follow this traditional model and are comprised of dual-earners or single parents, where both men and women have concurrent familial roles.<sup>205</sup> Therefore, the need for meaningful work-family accommodations continues to persist with no real legislative solution currently in existence.

To provide a workable solution for parents, Congress must enact intermittent parental leave. Currently, the FMLA does not provide parents with any parental leave options that would allow them to participate in the educational and extracurricular activities that are so crucial to their children's development.<sup>206</sup> As such, the substantive guarantee of up to twenty-four hours of parental involvement leave in

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<sup>199</sup> *Id.* at 731.

<sup>200</sup> *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

<sup>201</sup> *Alden v. Maine*, 527 U.S. 706, 730–33 (1999).

<sup>202</sup> *See Ex parte Young*, 209 U.S. 123 (1908) (holding that state sovereign immunity pursuant to the Eleventh Amendment is not violated when an injunction is sought against the state actor or officer who has a duty to enforce the laws of the state).

<sup>203</sup> *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court.").

<sup>204</sup> *See Kaminer*, *supra* note 1, at 310.

<sup>205</sup> *Id.* at 309–10.

<sup>206</sup> 29 U.S.C. §§ 2601–2654 (2000).



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the Enhancement Act<sup>207</sup> would serve as an important step to help parents straddle the line between being an invaluable asset to employers and a positive influence on their children.

Further, the FMLA's purpose of alleviating "women's issues"<sup>208</sup> has caused both men and women to feel the effects of workplace hostility and social stigma when attempting to take leave pursuant to the FMLA provisions. As a result, a workable legislative solution to the work-family conflict must not only be written in gender-neutral terminology, but its underlying purpose must also be gender-neutral—as an entitlement program aimed at overall familial health and social betterment. Therefore, the substantive provisions of the proposed Enhancement Act would be more effective in encouraging parental participation if passed independently of the FMLA and pursuant to the Commerce Clause.

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<sup>207</sup> H.R. 476, 109th Cong. (2005).

<sup>208</sup> 29 U.S.C. § 2601(a)(5) ("[T]he primary responsibility for family caretaking . . . affects the working lives of women more than it affects the working lives of men.").